

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CALVINE MALONE, et al.

Plaintiffs,

V.

STATE OF WASHINGTON et al.,

Defendants.

CASE NO. 14-cv-05974 RBL-JRC

ORDER

Before the Court are plaintiffs' motion for sanctions (Dkt. 152) and motion for
sanction (Dkt. 153). For the reasons set forth herein, the Court finds that both motions are
denied.

BACKGROUND

On March 9, 2017, the undersigned ordered that plaintiffs' motion to compel be granted, and that plaintiffs be allowed to depose eight defendants. Dkt. 146. On March 15, 2017, the parties conferred to discuss scheduling the depositions. Dkt. 155, Declaration of Craig Mingay.

1 **1. Motion for Sanctions (Dkt. 152)**

2 Plaintiffs ask that the Court enter sanctions because defendant Sziebert failed to appear
3 for a deposition, failed to notify plaintiffs or defense counsel prior to cancelling a deposition, and
4 failed to provide a reason for cancelling the deposition. Dkt. 152. Plaintiffs ask that the Court
5 enter sanctions against defendant Quigley based on an alleged pattern of delays, which
6 necessitated extensions of the discovery timeline. *Id.* Plaintiffs ask the Court to determine the
7 appropriate sanctions at the Court's discretion. *Id.*

8 In response, defendants provide the declaration of counsel Craig Mingay and Gregory
9 Ziser. Dkts. 155, 156. Mr. Mingay states that after the March 15, 2017 conference with plaintiffs,
10 counsel for defendants began scheduling the depositions. Dkt. 155 at ¶ 5. Mr. Mingay worked
11 with the Special Commitment Center ("SCC") to make arrangements for a room and recording
12 equipment, and that staff qualified to administer the oath were available. *Id.*

13 On March 17, 2017, Mr. Mingay discussed scheduling a deposition with defendant
14 Sziebert, who at the time, was out on annual leave. *Id.* Defendant Sziebert requested that the
15 deposition be scheduled after his return from leave, on April 11, 2017. *Id.* Mr. Mingay did not
16 provide written confirmation of the deposition to defendant Sziebert. *Id.* Defendant Sziebert
17 failed to attend the deposition on April 11, 2017, and according to Mr. Mingay, due to defendant
18 Sziebert's leave schedule, recent change in job duties, and recent surgery, defendant Sziebert did
19 not recall that the deposition had been scheduled. *Id.* On April 11, 2017, the parties conferred
20 and agreed to reschedule defendant Sziebert's deposition for April 21, 2017. *Id.* at ¶ 8. The
21 parties then agreed to extend the discovery deadline to August 31, 2017. *Id.*

22 According to Mr. Mingay, counsel for defendants sent a letter to defendant Quigley to
23 schedule the deposition. *Id.* at ¶ 5. After defendant Quigley failed to respond to the letter, Mr.
24

1 Mingay called defendant Quigley to set up the deposition. *Id.* at ¶ 7. Mr. Mingay did not hear
2 back from defendant Quigley, and followed up with an email. *Id.* On March 6, 2017, Mr. Mingay
3 received an e-mail response from defendant Quigley, indicating that defendant Quigley was out
4 of the country and would not be returning until May 3, 2017 and that defendant Quigley did not
5 have reliable communications while traveling. *Id.* As of the date of this Order, neither party has
6 updated the Court as to whether defendant Quigley's deposition was conducted after May 3,
7 2017.

8 Rule 37(b)(2)(A) provides the Court with the power to issue such sanction orders as are
9 "just" when a party has failed to comply with discovery orders. Such sanctions may include,
10 inter alia, an order that the subject matter of the discovery shall be taken to be established in
11 accordance with the party's defense, or that the party may not support or oppose designated
12 claims or defenses or introduce designated matters into evidence, or dismissing the action in
13 whole or in part, or finding the party to be in contempt of court. Fed. R. Civ. P. 37(b)(2)(A)(i)-
14 (vii); *see also Roadway Express v. Piper*, 447 U.S. 752, 763 (1980). If the sanction ordered is
15 less than dismissal, the party's noncompliance need not be proven to be willful or in bad faith.
16 *See, e.g., Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 843–44 (9th Cir. 1976).

17 There is no factual or legal basis for a finding that defendants Sziebert or Quigley have
18 failed to comply with this Court's discovery order or that they have engaged in any willful or bad
19 faith. Defendants provide sworn testimony that defendant Sziebert did not recall the scheduled
20 deposition, which was rescheduled and completed on April 21, 2017. The delay in defendant
21 Quigley's deposition is due to defendant Quigley's international travel. Plaintiffs have not
22 presented any evidence that defendants intentionally failed to respond to discovery or conduct

the depositions. None of the circumstances here warrant the entry of sanctions against defendants. Accordingly, plaintiff's motion for sanctions (Dkt. 152) is denied.

2. Motion to Substitute (Dkt. 153)

Plaintiffs also filed a motion to substitute. Dkt. 153. Plaintiffs cite as support for this motion Federal Rule of Civil Procedure 25(d). *See id.* Defendants filed a response. Dkt. 157.

Federal Rule of Civil Procedure 25(d) gives a plaintiff the ability to substitute a public officer if the named defendant dies or otherwise ceases to hold office. Fed. R. Civ. P. 25(d). Plaintiffs now attempt to add additional defendant William Van Hook in both his personal and official capacity as the new CEO of the SCC. Dkt. 153.

Pursuant to Rule 25(d), Mr. Van Hook's substitution for previous CEO, Mark Strong, is automatic. Thus, to the extent that plaintiffs' motion to substitute seeks to replace Mark Strong with William Van Hook as the SCC CEO, sued in his official capacity, plaintiffs' motion to substitute is granted.

However, to the extent that plaintiffs seek to add new claims against Mr. Van Hook in his personal capacity, the Court will not accept an amendment in this form and plaintiffs' request is denied. If plaintiffs seek to add personal capacity claims against Mr. Van Hook, they must file a motion for leave to amend their complaint.

Dated this 31st day of May, 2017.


J. Richard Creatura
United States Magistrate Judge